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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 335

UNITED STATES OF AMERICA,
for the use of Charles P. Wilhelm, Trustee of the Estate of W. H. Pentony, Bankrupt,
Petitioner,

vs.

NELLIE FLYNN CHAIN,
Executrix of the Last Will and Testament of James W. Flynn, Deceased,
Respondent.

BRIEF FOR RESPONDENT OPPOSING THE PETITION AND THE ISSUING OF THE WRIT OF CERTIORARI.

P. J. CROGAN,
FRANK COX,
Counsel for Respondent

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STATEMENT

The statement of the matters involved, found on pages two, three and four of the Petitioners petition herein seems to be correct as therein stated.

QUESTION INVOLVED

The only real question involved is this:

The Kingwood National Bank was designated a depository for the funds of bankrupt's estate and as such depository it executed a bond with George A. Herring, and James W. Flynn, sureties.

The bond was executed in 1924. Flynn died in 1926, and there were no funds deposited by the trustee up to that time in the bank.

There were no funds deposited in the bank by the trustee until some time in 1930, four and one-half years after the death of Flynn. The personal representative of the estate of Flynn knew nothing about his being on such bond and her attention was never called to the fact that deposits were being made in the bank after his death, and she had no notice of the bank being a depository with her father as surety, or no notice that deposits were being so made after his death until the bank closed in 1931.

The trustee in bankruptcy, Petitioner herein, lived in the same small town in which Flynn and Herring lived. Flynn was President of the bank at the time he died and Herring was a director. Upon Flynn's death Herring was elected President and so remained up until the closing of the bank in 1931.

The sole question is,—should Flynn's estate be held liable for those deposits which, for the first time, were made nearly five years after his death?

The Circuit Court of Appeals, Fourth Circuit, held that his estate should not be held liable under the circumstances. Fed. Vol.—84 (2nd)—138.

It is claimed that it would be a hardship on Herring to require him to pay this entire indebtedness. It is always a hardship for a surety to have to respond and pay out money for his principal default. If there was any one person in the whole transaction who could have pro-

tected himself and protected Flynn's estate that person was Herring. He was a director in the bank, knew of the bond which he and Flynn signed, and he remained a director for nearly five years before any deposits were made, and he knew at that period, five years, that no deposits were made until at that time. He could have prevented that by appealing to the referee or to the court to have a new bond given in the place of the one on which Flynn was surety in his lifetime, or he could have his bank refuse to accept any funds. If he had done this he would not be liable for more than one-half of it because the new surety would be liable for the other one-half, and no one would suffer more than was intended by the law. Just why Herring permitted matters to run along like this is not clear. There is no suggestion or averment that Herring is financially unable to pay this bond. Judgment has been entered against him by the District Court of the United States for the Northern District of West Virginia, for this entire amount, and so far as the record shows he has not paid any part of it,—and now Flynn's estate is being pursued by the Trustee, for some reason not disclosed, instead of the Trustee proceeding to collect the money against the man who has judgment rendered against him.

It looks to us as if this suit ought to be dismissed for the reason that the Trustee is pursuing the dead man's estate at the expense of the bankrupt's estate and creditors because all the costs and all of the necessarily large lawyers fees is coming out of the bankrupt's estate, and regardless of how this court decides, the bankrupt's estate will not profit. It is only a question of whether the dead man's estate shall pay one-half the debt and Herring pay the remainder, or whether Herring shall pay it all.

The case of Continental Casualty Company against the United States, 68 F. (2nd) 577, is not in point. In that case the surety had not died, but he sought ineffectively

to be released from the bond and he was refused. That is not this case. So that there is in fact no conflict between the decision of the Circuit Court of Appeals, Fourth Circuit, in this case and that of Continental Casualty Company against the United States, supra.

No Circuit Court of Appeals, so far as we have been able to discover, has decided this question except the Fourth Circuit, which decided it in the case at bar.

EFFECT OF DEATH OF SURETY

We admit:

(a) That the death of a surety on an official bond does not release his estate as to the funds in the hands of a principal at the time of his death.

(b) That the death of a surety does not release his estate where the bond for which he is surety is for costs for a pending or proposed suit even if those costs, or part of them, were incurred after the death of a surety.

(c) That the death of a surety does not release the estate where the bond is given by a fiduciary and though the breach of the bond was committed after the death of the surety.

In each of these cases the amount for which the principal will be liable, or the exact relationship of the principal to his surety is well known and the bondsman knows he is held for a debt liability, namely,—the costs of suit not yet incurred, or the amount of a single estate, whatever sum that might be.

It is different in cases like the one under consideration. When Flynn signed the bond there were no funds of that kind in the Bank. When he died there were no funds of that kind in the Bank, and for nearly five years after his death there were no funds of that kind placed in the Bank. His contract when he signed the bond did not render him liable for any money unless money were placed in the Bank; and money was placed in the Bank

nearly five years after his death, at a time when he could not contract, nor was it in contemplation that he would be held liable for what might be called a contractural relation between him and the bank after his death,— no such contract could be made.

As is stated in First Brandt on Suretyship, Sec. 152, citing Valentine vs. Kelley Bank, 133 Cal. 191,—

"A dead guarantor can make no promise."

To hold Flynn's estate liable for funds deposited four and one-half years after his death, and without the knowledge of his personal representative that such funds were so being deposited would, in our opinion, be a monsterous proposition and a travesty on justice.

SURETIES ARE FAVORED BY THE LAW

It is a rule of courts that sureties are favored by law; that the rule of *strictissimus juris* is applicable. The surety cannot be held liable, nor his liability extended beyond the strict terms of his engagement, nor by implication. They are not to be held liable beyond the strict letter of their obligation.

Cases holding that sureties are favored by the law are: —

21 R. C. L., page 1018, Sec. 66.
22 Amer. State Reports, page 814.
American Surety Co. vs. Fidelity. Trust Co., 179 Fed., 699.
Brooke vs. Clemens, 85 W. Va. 11.
Waldron vs. Coal Co., 101 W. Va. 596.

And it is stated that when the consideration passes at different times (as in this case) the deposits being made from time to time, the liability of the surety terminates by his death,—

23 C. J. 290-291
16 R. I. 148 National Eagle Bank.

There was no way in which the executrix could protect the estate as she had no knowledge whatever that her father was surety on the bond, and she knew nothing of the deposits being made by the Trustee until after the Bank closed. She lived, you might say, side by side in a small town with Herring the co-surety and with Wilhelm the Trustee, and yet she was kept in the dark all those years, and only knew the circumstances when the Bank failed and closed its doors in 1931, her father the co-surety having died in 1926.

The petitioner on page 15 of his brief in support of his petition among other things says:

> "It was the duty of any surety trying to be released or desiring to be released to take active steps to that end."

It would be interesting to know how petitioner's counsel claims that the surety, Flynn, should have taken active steps to be released unless they can ask him to get out of his grave and do so. He had no opportunity and no desire to be released while he was living. He could not speak after he died.

As stated before; the case of Continental Casualty Company against United States, 68 F. (2d) 577, and the case of United States against Robson, 28 American Bankruptcy Reports, 45, are not in point. In neither of these cases was the question of the death of a surety involved, and the same is true in the case of Smith vs. United States, 8 L. Ed. 130, cited by counsel for petitioner.

We are dealing with this case at bar as the facts present themselves and not with an imaginary case of a deposit made ten minutes after the death of a surety.

We most respectfully submit that the opinion of the majority of the members of Circuit Court of Appeals, Fourth Circuit, in this case is conclusive and beyond question a proper decision under the facts and circum-

stances in this case, and that the question is so clear, so fair and according to justice and right that the prayer of the petitioner should be refused.

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